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NO. 105

In the Supreme Court of the United States

October Term, 1924

ROBERT DAVID KENNEDY, PETITIONER

THE UNITED STATES OF AMERICA

VS. PETITION FOR WRIT OF HABEAS CORPUS, TO SET ASIDE
STATE COURT ORDER OF CONFINEMENT FOR THE PETITIONER

JOHN HENRY AND WALTER GALT

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 705

ROBERT DAVID KERCHEVAL, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals may be found at page 475 of the record. It is reported in 12 F. (2d) 904.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered on May 4, 1926. (R. 483.) A petition for rehearing was filed and entertained, but denied on July 26, 1926. (R. 503.)

The jurisdiction of this Court to grant the writ prayed for was conferred by the Act of February 13, 1925. (C. 229, 43 Stat. 936, 938.)

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Arkansas, under an indictment charging him with using the mails in the promotion of certain fraudulent oil companies. (R. 1 and 23.) He was sentenced to serve concurrently sentences of three years on each of five counts of the indictment, and to pay a fine of three hundred dollars on each count. (R. 25.) On writ of error, the judgment of conviction was affirmed. (R. 483.)

As justifying further review by this Court, he alleges error on the part of the trial court, concurred in by the Circuit Court of Appeals, in admitting in evidence a previous plea of guilty to the indictment here involved, which plea, by leave of court, had theretofore been withdrawn, and a plea of not guilty substituted. He also urges that error was committed by the courts below in holding that even though the indictment charged that petitioner intended to convert to his own use the moneys received by him from the public, it was unnecessary to prove such allegation, as it is not "an element of crime under Section 215 of the Penal Code." (R. 482.)

ARGUMENT

On the main question raised by petitioner, viz, whether a withdrawn plea of guilty may be thereafter introduced in evidence against him at his subsequent trial, there exists a conflict between the

decision of the Circuit Court of Appeals below and the decision of the Court of Appeals for the District of Columbia in *Heim v. United States*, 47 App. D. C. 485. In the latter case the Court of Appeals held, one judge dissenting, that it was reversible error for a trial court to permit the withdrawn plea to be so introduced. The Government sought to obtain from this Court a writ of certiorari in that case, but it was refused. 247 U. S. 522. What is regarded as the leading State case upon the point is that of *State v. Carta*, 90 Conn. 79, in which it was held, by a divided court, that it was permissible to introduce against a defendant a withdrawn plea of guilty.

CONCLUSION

In view of the general importance of the question in the administration of the criminal laws, and the conflict of decisions thereon, the Government does not oppose the granting of the writ prayed for.

✓ WILLIAM D. MITCHELL,
Solicitor General.

✓ O. R. LUHRING,
/ *Assistant Attorney General.*

HARRY S. RIDGELY,
Attorney.

NOVEMBER, 1926.